United Nations A/HRC/39/NI/1

General Assembly

Distr.: General
4 September 2018

Original: English

Human Rights Council
Thirty-ninth session
10–28 September 2018
Agenda 6
Universal periodic review

Joint written submission by the Equality and Human Rights Commission of Great Britain, the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission*

Note by the Secretariat

The Secretariat of the Human Rights Council hereby transmits the communication submitted by the Equality and Human Rights Commission of Great Britain, the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission**, reproduced below in accordance with rule 7(b) of the rules of procedures described in the annex to Council resolution 5/1, according to which participation of national human rights institutions is to be based on arrangements and practices agreed upon by the Commission on Human Rights, including resolution 2005/74 of 20 April 2005.

* National human rights institution with A status accreditation from the Global Alliance of National Human Rights Institutions.

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GE.18-14588(E)

1814588

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Annex

Submission by the Equality and Human Rights Commission of Great Britain, the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission

UPR statement by the UK NHRIs to the HRC 39th session

Mr President,

I make this statement on behalf of the UK's three 'A status' National Human Rights Institutions. Almost exactly one year ago today, this Council adopted the outcome of the UK's third Universal Periodic Review (UPR).

At that time we provided a statement in this Chamber calling for greater engagement with the UPR process going forward, and for governments across the UK to publish clear and actionable implementation plans.

Though this has not yet happened, we are encouraged by the update report published by the UK Government in August, and the Scottish Government's detailed response to each UPR recommendation, published earlier this year. The absence of the NI Assembly has hampered progress towards implementation of the UPR recommendations in Northern Ireland and is a serious source of concern.

It would be easier to determine progress going forward if a clear framework is published as a basis for implementation. We offer our practical support to UK and devolved governments in the development of UPR implementation plans, utilising the best practice honed by other institutions and Member States represented here today. We believe these plans should set out commitments to specific actions and clear mechanisms for monitoring and reporting on progress.

We hope that this process can begin without delay, with meaningful input from stakeholders across the country. Doing so ensures the continued credibility of this vital process, both at home and internationally.

We believe that developing a system of durable and effective follow-up will better enable the UK to fulfil the UPR's objective of improving the human rights situation on the ground, and hope to be able to provide positive updates to the Council in this regard in 2019.

Thank you.

United Nations A/HRC/39/NI/2

General Assembly

Distr.: General
4 September 2018

Original: English

Human Rights Council
Thirty-ninth session
10–28 September 2018
Agenda 7
Human rights situation in Palestine and other occupied Arab territories

Written submission by the Independent Commission for Human Rights of the State of Palestine*

Note by the Secretariat

The Secretariat of the Human Rights Council hereby transmits the communication submitted by the Independent Commission for Human Rights of the State of Palestine**, reproduced below in accordance with rule 7(b) of the rules of procedures described in the annex to Council resolution 5/1, according to which participation of national human rights institutions is to be based on arrangements and practices agreed upon by the Commission on Human Rights, including resolution 2005/74 of 20 April 2005.

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GE.18-14591(E)

1814591

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Annex

Submission by the Independent Commission for Human Rights of the State of Palestine

Israeli Violations of Palestinian Human Rights in the Occupied Palestinian Territory

The Israeli occupying power have systematically continued to escalate violations of the principles of International Humanitarian Law (IHL) and day-to-day abuses of Palestinian human rights across the Palestinian territory occupied in 1967. The status of human rights and IHL continued to deteriorate as a result of ongoing Israeli breaches of the rights of Palestinian civilians in the occupied Palestinian territory (oPt), including East Jerusalem. Multiple Israeli violations and abusive policies against Palestinian civilians targeted Palestinian lives, freedoms and properties in both West Bank and Gaza Strip.

Attacks on the Gaza Strip

The occupying Power has continued to implement a policy of collective punishment against the Gaza population. For 12 years in a row, Israel has imposed a tightened blockade on the Gaza Strip. Since the beginning of 2018, the Israeli occupying forces have sustained and intensified attacks on Gaza. In addition to airstrikes, encroachments included hundreds of shooting incidents along the eastern border of Gaza as well as dozens of incursions and artillery shellings. Israeli forces attacked Palestinian fishermen at sea, opened fire on, destroyed and seized fishing boats. On arbitrary grounds, Israeli forces arrested civilians on Beit Hanun Crossing. The Israeli occupying forces targeted civilians and workers at industrial and agricultural facilities near the perimeter fence around Gaza.

Israeli abuses have exacerbated after weekly peaceful demonstrations of the Great March of Return began on 30 March 2018. These demonstrations are organised in protest against Israel's continued occupation and encroachments on the Gaza Strip and its population. The Israeli occupying forces continued to use excessive force against civilian participants in peaceful demonstrations. Protestors did not pose a threat to the Israeli occupying troops, who were positioned along the perimeter fence around Gaza. The Israeli occupying forces also continued to target health workers, indicating a systematic Israeli policy to impede this humanitarian action, which is enshrined in and protected by IHL rules.

Israeli attacks on peaceful demonstrations have resulted in the killing of 130 Palestinian civilians, including 23 children including 1 girl. Fatalities included three persons with disabilities, one woman, three paramedics, and two journalists. Almost 6,729 civilians injured by live ammunition and tear gas grenades fired directly on protestors, including 1,140 children, 203 women, 103 paramedics, and 78 journalists. Of these, 422 civilians were in critical health condition. Another 69 injured civilians suffered amputations in upper or lower extremities.

Additionally, ambulances were targeted in direct attacks. Fire was opened on paramedics, preventing them from accessing and providing first aid for injuries. According to the Palestinian Ministry of Health, attacks on health workers have risen by 100 percent. The Israeli occupying power have also continued to obstruct the work of medical teams, deny access for medical personnel, and restrict the entry of medical supplies into the Gaza Strip, marginalised areas, and communities behind the Wall in the West Bank. Mobile clinics and healthcare facilities have been seized, disrupting the provision of healthcare services to Palestinians.

The Israeli naval forces have continued to target Palestinian fishermen across the permissible fishing zone, which Israel has reduced back to 3 nautical miles. Israeli naval personnel opened fire, destroyed and seized fishing boats, affecting the livelihoods of fishermen. The Israeli occupying forces continued to make incursions into, and carried out

land levelling operations in the Gaza Strip. The Israeli forces targeted farmers and shepherds in the buffer zone near the perimeter fence east and north of the Gaza Strip, putting their lives at risk. In addition, the Israeli occupying forces attacked and prevented Palestinian farmers from using their agricultural land. In this area, Palestinian civilians suffered from multiple abuses. The Israeli occupying forces used various weapons to create restricted areas that in some parts of Gaza have extended for up to 1,500 metres along the eastern and northern perimeter fence.

The Israeli occupying power have continued to restrict access to and from the Gaza Strip, particularly for patients referred for medical treatment outside Gaza as well as for students at universities abroad. Furthermore, access restrictions were placed on humanitarian assistance, medical aid, construction materials, food and fuel supplies. Like other civilians, patients allowed access to medical treatment outside Gaza are subjected to strict measures, restrictions and inhuman and degrading treatment in many cases at crossing points, seriously jeopardising the lives and aggravating the pain of these patients.

Abuses in the West Bank

In the first half of 2018, the Israeli occupying forces continued to target, kill and injure Palestinian civilians in the West Bank, using live ammunition, rubber coated steel bullets, and tear gas. In the West Bank, Gaza Strip and East Jerusalem, the Israeli forces killed a total of 211 civilians and injured another 6,258.

As proof of the collective punishment policy, the Israeli occupying power continued to withhold the corpses of 253 male and female Palestinians in the so-called cemeteries of numbers. Of these, the bodies of 28 Palestinians have been withheld since 2015. The occupying Power has held the bodies of over 200 Palestinians for periods that ranged from three days to more than two and a half years. This policy is used as a tool to deter Palestinians who would carry out operations against Israeli soldiers and settlers as well as to cover up suspicions and circumstances surrounding the way they were killed by the Israeli occupying forces.

Since the beginning of 2018, at least 2,729 shooting incidents and 4,209 raids by the Israeli occupying forces into Palestinian cities, towns and villages have been monitored. During the reporting period, restrictions on access and movement on military crossing points, gates and flying checkpoints have been recorded on 2,530 occasions.

The Israeli occupying power also continued to attack freedoms. Since the beginning of 2018, the Israeli occupying forces have arrested at least 3,926 Palestinian civilians on arbitrary grounds in the West Bank, Gaza Strip, and East Jerusalem. On at least 184 occasions, the Israeli occupying forces violated religious freedoms and desecrated places of worship. Based on a decision from US President Trump, the US embassy was relocated to occupied Jerusalem. Consequently, Israeli settlers have increasingly raided Al-Aqsa Mosque compound. During the reporting period, 16,000 Israeli settlers break into the compound.

In West Bank, the Israeli occupying power demolished 62 homes and 181 structures. In East Jerusalem, 11 Palestinian families demolished their own homes to avoid hefty fines. On punitive grounds, the Israeli forces demolished five homes belonging to Palestinian prisoners and ع charged with military operations. In addition to occupying Palestinian homes on 32 occasions, the Israeli forces carried out 479 instances of destroying, confiscating and attacking Palestinian properties. Home demolitions were 44 percent higher in East Jerusalem than in other areas across the oPt. A total of 190 demolition and stop work orders were distributed, targeting Palestinian homes and structures. Meantime, settlement construction and expansion have continued at an increasing pace, particularly in occupied East Jerusalem. Palestinian homes have been demolished, allegedly for the lack of Israeli-issued building permits. Across the city of Jerusalem, the majority of Palestinian homes no longer meet population growth needs. The Israeli occupying power have set stringent requirements to restrict access to obtain construction licences or to repair and renovate existing homes.

In this context, the Israeli High Court of Justice rendered a decision, approving the demolition of Khan al-Ahmar Bedouin community east of occupied Jerusalem, including

the community's mosque and school. Residents are at risk of an Israeli plan of forcible transfer and relocation from their community. The Israeli authorities attempt to designate large swathes of land for a settlement plan to connect the settlement of Ma'ale Adumim to occupied Jerusalem and expand the city's municipal boundaries at the expense of Palestinians. Amounting to a war crime, this action paves the way for isolating northern from southern West Bank and thwarting the establishment of a future independent Palestinian state. The Khan al-Ahmar community is home of 41 Palestinian families, including180 members, of Al-Jahalin Bedouin tribe. Serving almost 170 students from five neighbouring Bedouin communities, the school is built of wheel tyres and mud.

By means of occupation, arbitrary property destruction and forcible transfer, Israeli policies seek to replace the Palestinian civilian population with Israeli settlers in the oPt. This is a grave breach of the 1949 Fourth Geneva Convention. It also amounts to a war crime under the Rome Statute of the International Criminal Court (ICC).

Settlement expansion has also continued unabated across the West Bank, particularly in Area C. For the purposes of settlement activity, the Israeli occupying power confiscated Palestinian-owned land, constructed settler bypass roads, and declared large swathes of land as closed military and firing zones. In the first half of 2018, the Israeli occupying power confiscated over 337 *dunums* (83.2 acres) of Palestinian privately-owned land and levelled hundreds of acres of agricultural of land across the West Bank.

According to the Palestinian Monitoring Group of the Palestine Liberation Organisation, almost 364 incidents and encroachments involving settlement activity were reported. During the reporting period, the Israeli occupying power approved the construction of 2,620 new housing units in West Bank settlements. Older construction plans were also resumed, including 166 housing units for retired military and police officers in southern Jerusalem. A tender was announced for the construction 459 housing units in the settlement of Ma'ale Adumim. Licences were issued for the construction of 450 housing units in settlements built on Palestinian privately-owned land south and east of the Bethlehem city.

In several areas across the West Bank, Israeli settlers took control of Palestinian privately-owned land, installed caravans, and constructed settlement outposts. The Israeli occupying power approved the processing of a set of settlement plans. Projects to construct new settler bypass roads to fragment, and connect settlements in the West Bank were endorsed. In this context, Israeli bulldozers have already began constructing several settler bypass roads in the West Bank.

In the meantime, an upsurge in settler violence was reported across the West Bank. Israeli settlers killed four civilians and injured 106 others, including 19 children. Settler violence included vehicle-ramming attacks along West Bank roads, shootings, uprooting and arson of fruit-bearing trees, killing and theft of livestock, damage of car wheel tyres. On dozens of occasions, Israeli settlers threw stones at, and caused extensive damage to, Palestinian civilian cars and homes. Under the protection of Israeli occupying forces, Israeli settlers raided religious and archaeological sites in some West Bank governorates.

Conclusion

All these violations of International Law and IHL rules are underpinned by impunity and lack of accountability of the occupying Power. Hence, Israel is encouraged to perpetrate more atrocities, systematically violate human rights, and derogate from the Rome Statute of the ICC and 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. According to Article 1 of the Fourth Geneva Convention, the High Contracting Parties undertake to respect and to ensure respect for the Convention in all circumstances. Article 146 also provides that each High Contracting Party is under the obligation to prosecute persons alleged to have committed, or to have ordered to be committed, grave breaches of the Convention. High Contracting Parties should call on and ensure that the occupying Power respect the Convention and safeguard the Palestinian civilian population's right to protection across oPt.

The Independent Commission for Human Rights (ICHR) calls on the United Nations Human Rights Council (UNHRC) to play its role in promoting and protecting Palestinian

human life and rights. ICHR requests that UNHRC hold the occupying Power to account for violating IHL rules.

ICHR calls on the UNHRC and international community to take immediate action and bear their legal and moral responsibilities for putting an end to Israeli settlement activity plans across oPt. ICHR further calls for an unequivocal position towards Israel's continued policy of withholding the bodies of Palestinians. These should be handed over to their families to be honourably buried according to the rites of their religion and in a manner befitting their human dignity.

ICHR calls upon UNHRC to expedite the dispatch of the Independent, International Commission of Inquiry, which was decided by UNHRC on 18 May 2018, to Investigate Human Rights Violations in the Context of Large-Scale Civilian Protests in oPt.

ICHR calls upon UNCHR to call for a complete lifting of the blockade on the Gaza Strip, which considered as a collective punishment of the Palestinian civilian population.

United Nations A/HRC/39/NI/3

General Assembly

Distr.: General
4 September 2018

Original: English

Human Rights Council
Thirty-ninth session
10–28 September 2018
Agenda 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Written submission by the Public Defender's Office of Georgia*

Note by the Secretariat

The Secretariat of the Human Rights Council hereby transmits the communication submitted by the Public Defender's Office of Georgia**, reproduced below in accordance with rule 7(b) of the rules of procedures described in the annex to Council resolution 5/1, according to which participation of national human rights institutions is to be based on arrangements and practices agreed upon by the Commission on Human Rights, including resolution 2005/74 of 20 April 2005.

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** Reproduced in the annex as received, in the language of submission only.

GE.18-14594(E)

1814594

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Annex

Submission of the Public Defender's Office of Georgia to the 39th Session of the Human Rights Council on the Rights of Older Persons in Georgia

Mr. President, distinguished members of the Human Rights Council, Ladies and Gentlemen, first and foremost, I would like to thank you for the opportunity to address the Human Rights Council. It is a great honor to speak on the behalf of the "A" status human rights institution - the Office of the Public Defender of Georgia, in response to the report of the Independent expert on the enjoyment of all human rights by older persons on her mission to Georgia.

Also let me thank the Independent Expert Ms. Rosa Kornfeld-Mate for the comprehensive and valuable piece of work she produced after her mission to Georgia.

First of all, let me start with the positive steps taken by the Georgian government towards protection of the rights of older persons. In 2013, the government of Georgia, together with the United Nations Economic Commission for Europe (UNECE) designed a roadmap for mainstreaming population ageing issues in Georgia in accordance with the Madrid International Plan of Action. This Roadmap served as a basis for the 'State Policy Concept on the Ageing Issue in Georgia', adopted by the Parliament in May, 2016.

The Action Plan for 2017-2018 was approved only in November, 2017, therefore, the responsible state agencies have only one year to fulfil their obligations under the Action Plan and the process of the State Policy Concept implementation is hampered. Also, there is no regular and stable mechanism ensuring cooperation between the state agencies on the given issue.

Despite some improvements, there are numbers of challenges and obstacles, which have to be addressed. Based on our work we can conclude that the majority of older people do not have access to adequate housing, social services and protection mechanisms, and therefore, they live in poverty, lacking the shelter and are under risk of isolation. Acts of violence against them are quite frequent.

There is an evident lack of housing to ensure adequate living for older persons. Quantifying the actual need is difficult, as disaggregated statistical information regarding living conditions for different groups are not available.

Another challenge in ensuring the independent living of older persons is related to the age discrimination in the area of employment – during hiring, promotion and training of employees.

Ensuring the age-friendly environment in the country is also problematic. Access to means of transport for people with special needs, and connectivity in remote and rural areas are important issues of concern, in particular when it comes to reaching hospitals or other care facilities.

Despite the improvement in the quality of elderly health care provided by the State Health insurance Program, the practice revealed that there are frequent complaints related to insurance administration, including the waiting lines at the medical facilities, uncovered medicine costs and in some cases neglect from the side of medical personnel.

Elderly people often become victims of violence, including from family members. There are difficulties in identifying instances of violence and, when identified, the authorities often fail to undertake adequate responses to protecting victims from repeat acts of violence.

As a concluding remark, I do hope that all recommendations envisaged in the Report will be taken seriously by the concerned state institutions and we will witness obvious and tangible developments and we are ready to continue our constructive work with Georgian government in that regard.

Moreover we expresses reediness to fulfil the recommendation regarding our office and structure to make our work more effective while promoting human rights of older persons.

United Nations A/HRC/39/NI/4

General Assembly

Distr.: General
4 September 2018
English
Original: Spanish

Human Rights Council
Thirty-ninth session
10–28 September 2018
Agenda item 2
Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Submission by the Office of the Human Rights Advocate of Guatemala*

Note by the Secretariat

The Secretariat of the Human Rights Council hereby transmits the communication submitted by the Office of the Human Rights Advocate of Guatemala, reproduced below in accordance with rule 7 (b) of the rules of procedures described in the annex to Council resolution 5/1, according to which participation of national human rights institutions is to be based on arrangements and practices agreed upon by the Commission on Human Rights, including resolution 2005/74 of 20 April 2005.**

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** Reproduced in the annex as received, in the language of submission only.

GE.18-14608 (E) 120918 130918

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Anexo

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Declaración de la Procuraduría de los Derechos Humanos, en el marco del Informe de la Relatora Especial sobre los derechos de los pueblos indígenas sobre su visita a Guatemala

I. Introducción

1. Existe normativa nacional que explicita los derechos de los pueblos indígenas, partiendo de la Constitución Política de la República, de 1985, la cual establecía que debía elaborarse una ley específica para ello, misma que ni siquiera existe en proyecto.

a) Caracterización de la situación de los Pueblos Indígenas

2. Los pueblos indígenas están sujetos a desplazamientos internos y son despojados de sus tierras, dejándolos en la pobreza y sufren violaciones al derecho a la alimentación, salud, vivienda, educación, acceso a la justicia y desarrollo entre otros; la defensa de este derecho a la tierra por parte de los líderes comunitarios y autoridades indígenas los ha visibilizado para que sean objeto de criminalización por parte del propio Estado y por la presión de grupos económicos poderosos que realizan esfuerzos constantes por despojar de la tierra a los pueblos indígenas. La situación de incumplimiento de los derechos de los Pueblos Indígenas, hoy más que nunca se está agudizando, agravando sus precarias condiciones de vida, sumiéndoles en situaciones inhumanas de existencia, miseria y hambre. Según la Encuesta Nacional de Empleo e Ingresos (ENEI 1-2017), el 40% de la población se autoidentificó como indígena.

3. Según la Encuesta Nacional de Condiciones de Vida ENCOVI de 2014, la pobreza total en población indígena llegaba a 79.2% y en población no indígena era 46.6%, siendo la pobreza extrema de 39.8% y 12.9% respectivamente.

4. En Guatemala el 35% de la población vive en el área urbana y el 65% en el área rural; el agro es la fuente más importante de divisas y empleo. Sin embargo, la estructura agraria y las relaciones sociales en el medio rural han estado vinculadas a grandes desigualdades sociales y, como en otros países de América Latina, los indicadores de pobreza son peores en la población rural. Esto afecta gravemente las posibilidades de desarrollo de la población, en tanto que las causas estructurales del hambre están íntimamente relacionadas con el uso, planificación y distribución de la tierra, así como con la ausencia de políticas públicas que aseguren a las poblaciones rurales sus medios de subsistencia. Según el índice nacional de seguridad alimentaria, el 23% de la población se encuentra en condiciones de inseguridad alimentaria.

5. Existen altos niveles de desnutrición (casi el 50% de la niñez menor de 5 años vive en desnutrición crónica) y muerte provocadas por la desnutrición aguda en diversas regiones del país, sobre todo en el área rural, donde vive mayoritariamente población indígena. En 2017 se identificó una prevalencia de desnutrición crónica en niñez indígena de 6 a 10 años de 51% en tanto que la niñez no indígena tenía una prevalencia de 26.4%. Sin embargo, cabe resaltar que los casos de desnutrición aguda fueron mucho menores en niñez indígena (1,994) que en no indígenas (5,266).

b) Tierra y territorio

6. Desde 2005 la Corte de Constitucionalidad (CC) (expediente 1179-2005)[1] ha exhortado al Congreso de la República para armonizar varias leyes que regulan de forma general la consulta previa en Guatemala. La CC (expediente 121-2007) advierte que la normativa que regula las consultas en Guatemala (el Convenio 169 de la OIT, el Código

[1] Ver otras exhortativas en: Expedientes acumulados 156-2011 y 159-2014 del 25 de marzo 2015.

Municipal y la Ley de Consejos de Desarrollo), es bastante amplia y poco precisa en cuanto al desarrollo de los procedimientos de consulta[2].

7. Más recientemente, la misma CC, en el Caso Oxec y Oxec II (Expedientes Acumulados 90-2017, 91-2017 Y 92-2017), conminó al Congreso de la República a emitir una normativa antes del 26 de mayo de 2018. El pasado febrero los diputados García Rodas y Chinchilla Guzmán presentaron la iniciativa de ley 5416, "Ley de consulta a los pueblos indígenas conforme al Convenio 169 de la OIT"[3], aún no discutida en el pleno ni puesta a consulta.

8. La Corte de Constitucionalidad determinó (Expedientes acumulados 90-2017, 91-2017 Y 92-2017, Pág. 64) que el procedimiento contemplado en la Ley General de Electricidad (artículos 15 al 19 y su Reglamento) no resulta idóneo para que la consulta pueda tener lugar de forma acorde a su naturaleza y finalidad, ambas ajenas e incluso contradictorias con el objetivo que persigue la consulta PLI. Además, la Corte determinó que en los estudios de evaluación de impacto ambiental y el apartado de opinión pública, se pudo constatar que estos no son contundentes para demostrar que se realizó la consulta conforme los estándares delineados internacionalmente. Ninguna de las normas arriba mencionadas incorpora requerimientos tendientes a que los pueblos indígenas sean consultados antes de la aprobación de licencias de exploración o explotación de proyectos mineros.

9. El organismo ejecutivo ha puesto en marcha iniciativas para reglamentar la consulta previa en febrero de 2011, enero 2016 y julio 2017, bajo la crítica de organizaciones de pueblos indígenas y de organismos internacionales[4]. Muchas de las observaciones generales continúan siendo de actualidad y son incluso aplicables a las propuestas hechas por el ejecutivo en enero 2016 y julio 2017, incluso a la iniciativa ahora presentada en 2018 en el seno del legislativo.

10. La ley debe considerar la existencia de una entidad responsable de la coordinación del proceso y logística de las consultas y a qué nivel actuará; pero no compete a esta entidad concentrar poderes ni decisiones sobre los asuntos que deben someterse a consulta, sino cumplir con las funciones de secretariado, de las cuales, entre las más importantes están coordinar el proceso de consulta previa en sus primera fases, la logística de su realización, su registro, e informar sobre el seguimiento a sus acuerdos. La instancia de coordinación debe también convocar a representantes de todas las posibles partes implicadas y que se consideren afectadas sin limitar su número, particularmente de las instituciones representativas de pueblos indígenas, planear el proceso de consulta, cronograma y registro de lo actuado (actas, definición de mecanismos de supervisión e implementación de compromisos y reparaciones, entre otras).

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[2] La CC pide al Congreso proceder a realizar una reforma legal, a efecto de, a) armonizar el contenido de los artículos 64 y 66 del Código Municipal en el sentido de determinar con precisión cuándo una consulta municipal tendría efecto vinculante; y b) referido en los artículos 15 del Convenio 169 de OIT y 26 de la Ley de Consejos de Desarrollo Urbano y Rural, se legisle sobre la forma cómo deben desarrollarse esos procedimientos consultivos, quién debe ser el órgano convocante, quién desarrolle la consulta, quién podrá participar, y los efectos de los resultados obtenidos.

[3] En el Congreso de la República existe la iniciativa, bajo registro 3684, "Ley de Consulta a los Pueblos Indígenas" conocida por el pleno desde el 25 de septiembre de 2007, presentada por el diputado Víctor Montejo, a instancia de organizaciones mayas. La iniciativa en mención pasó a la Comisión de Pueblos Indígenas y ha permanecido en el Congreso sin haberse incluido en agenda legislativa a la fecha.

[4] En el informe de su visita a Guatemala en 2011, el Relator James Anaya indica que "A pesar de las obligaciones internacionales del Estado guatemalteco y de los compromisos adquiridos en su legislación interna, no existe actualmente en Guatemala un marco jurídico e institucional adecuado para llevar a cabo el deber estatal de consulta a los pueblos indígenas. La falta de regulación interna o, en todo caso, de una práctica sistemática en relación con la consulta previa constituye también una dificultad añadida" Informe del Relator Especial Sobre los Derechos de los Pueblos Indígenas, por mandato del Consejo de Derechos Humanos de Naciones Unidas, Observaciones sobre la situación de los derechos de los pueblos indígenas de Guatemala en relación con los proyectos extractivos, y otro tipo de proyectos, en sus territorios tradicionales 1. A/HRC/16/xx Del 4 de marzo 2011.

11. El Estado no puede imponer un modelo de consulta, sino establecer un diálogo intercultural con las comunidades y este puede ser indirecto, a través de las autoridades representativas de las comunidades, o directo, delegando el Estado a un representante con capacidad de decisión que participa, respeta o sigue las tradiciones y costumbres propias.

c) Desalojos y desplazamientos forzados

12. La inseguridad en la tenencia de la tierra de los pueblos indígenas se traduce en desalojos forzosos; la institucionalidad nacional no está diseñada para atender la problemática de la tierra de acuerdo con los estándares internacionales en materia de derechos humanos. Muchas comunidades, casi en su totalidad indígenas, han sido desalojadas sin que se haya establecido con claridad la propiedad de la tierra y sin ser escuchadas por las autoridades judiciales. Por otro lado, no se considera la legitimidad de posesión ancestral de la tierra de las comunidades, por lo que el PDH recomendó al Estado que no se puede dar el desalojo si no se cumplen con los protocolos mínimos internacionales para la realización de estos y en tanto no pueda garantizar el registro de información catastral, la propiedad de la tierra y los derechos de los pueblos indígenas a sus tierras en posesión ancestral.

13. Los desalojos en Guatemala conllevan una serie de violaciones a derechos humanos, porque las autoridades no aplican los estándares internacionales en la materia (asegurar albergue, alimentos, protección, entre otras cosas) y no han cumplido con los procesos correspondientes para garantizar, a través de estudios socio-históricos, antropológicos, catastral, registral, y de otra índole, que dichas tierras no pertenecen a pueblos indígenas. Por otro lado, en términos generales, no se garantiza a las comunidades el acceso a recursos jurídicos y asesoría oportuna.

14. En ninguno de los desalojos implementados por el Estado se ha contado con un plan de reubicación para la población desalojada, ni se ha previsto albergue temporal y la atención de emergencia (salud, alimentación, educación, etc.).

d) Criminalización de los Pueblos Indígenas, sus comunidades, organizaciones y liderazgos

15. En la dinámica de la defensa de los derechos de los Pueblos Indígenas, el Estado no solo no responde a sus demandas, sino les criminaliza por su actuación, utilizando el derecho penal en contra de sus liderazgos y desacreditando su cosmovisión y su lucha legítima.

16. La conculcación de los derechos de los Pueblos Indígenas se desarrolla en medio de escenarios sociales en los que se generan dinámicas de conflictividad por la falta de atención y cumplimiento por parte del Estado a los reclamos de los pueblos. Es decir, que la defensa de los derechos de los pueblos indígenas se dan en condiciones adversas para los mismos.

17. El Estado y particulares (empresarios) han utilizado el derecho penal con el fin de criminalizar a quienes defienden el territorio y la tierra. Pareciera que el Estado utiliza el Estado de Derecho cuando le conviene, pero no lo hace cuando beneficia a los Pueblos Indígenas. Incluso se menciona por parte de los defensores y defensoras de derechos humanos que pareciera ser que en Guatemala hay dos ministerios públicos, uno que tiene una lucha frontal contra la corrupción; y otro, que criminaliza las luchas de los pueblos indígenas especialmente de la madre naturaleza.

18. Los liderazgos indígenas y comunitarios buscan acercamientos con las autoridades nacionales y locales, con el fin de buscar soluciones a sus demandas; la dinámica generalizada es que el Estado instala "mesas de diálogo" que se han convertido en monólogos o "diálogos de sordos", porque no solo no sirven para contribuir a solucionar la problemática planteada, sino se han convertido en burla para las comunidades, por ejemplo, cuando se tiene instalada una mesa relacionada con un reclamo de tierra y el Estado ordena y realiza el desalojo.

19. En esa dinámica se utilizan incluso figuras penales inexistentes o que no están tipificadas como delitos dentro del derecho guatemalteco, tal el caso del "robo de fluido eléctrico" cuando se criminaliza a las comunidades por el uso de frecuencias para el desarrollo de la comunicación a través de las radios comunitarias, o se les acusa de usurpación y usurpación agravada cuando los pueblos han vivido por generaciones en el territorio del cual los pretenden expulsar. Asimismo, se han dado casos de liderazgos comunitarios o indígenas que han sido acusados por delitos supuestamente cometidos por ellos y en lugares donde ni siquiera han estado[5].

20. El racismo estructural que existe en Guatemala hace que también haya descalificación por parte de la sociedad en relación con las tradiciones y cosmovisión indígena que reclama su territorio.

II. Respuesta del Estado frente a los Pueblos indígenas

21. Además de la agenda específica para pueblos indígenas que debe aprobarse en el Congreso de la República, también es importante señalar que los Acuerdos de Paz (que constituyen acuerdos de Estado) no han sido cumplidos, en particular el Acuerdo de Identidad y Derechos de los Pueblos Indígenas, el Acuerdo Global sobre Derechos Humanos y el Acuerdo Socioeconómico y de Situación Agraria.

22. Es importante hacer notar que todas estas leyes de beneficio para los pueblos indígenas se encuentran sin avance específico, pero sí esperando el momento para ser incluidas en la agenda del Congreso de la República. El Congreso se plantea conocer la iniciativa de ley 5416 que dispone aprobar la "Ley de Consulta a Pueblos Indígenas, conforme el Convenio 169 de la Organización Internacional del Trabajo", misma que carece de procesos consultivos a los pueblos indígenas y con ello es fácil determinar que cuenta con desaprobación de estos pueblos.

23. La Constitución Política de la República reconoce la pluriculturalidad del país (art. 66). El Acuerdo sobre el fortalecimiento del Poder Civil y función del Ejército en una Sociedad Democrática[6] estableció entre sus compromisos la conformación de la Comisión Nacional para el Seguimiento y Apoyo al Fortalecimiento de la Justicia, la que se constituyó por Acuerdo Gubernativo 221-97. Dicha comisión presentó su informe final Una Nueva Justicia para la Paz, en el cual señaló la falta de reconocimiento y consideración de las formas de "justicia tradicional", alternativa a la justicia oficial, que facilitan la resolución de conflictos y lo hacen con pertinencia cultural.

24. Algunos avances se han dado en instituciones del Estado de cara al derecho Maya. En abril de 2012 la Cámara Penal de la Corte Suprema de Justicia solicitó a los jueces, juezas, magistrados y magistradas que apliquen la normativa nacional e internacional en materia de pueblos indígenas, promoviendo la complementariedad y armonización del ordenamiento jurídico nacional integrado por el sistema jurídico oficial e indígena; esto se suma a la iniciativa de ley de jurisdicción indígenas que no ha sido discutida en el Congreso. La reforma al Código Procesal Penal (art. 55 bis, decreto 79-97) creó juzgados de paz comunitarios (en 5 municipios) para atender determinadas situaciones de conformidad con las costumbres locales; asimismo, creó el Centro de Mediación y Conciliación. La duración de los juzgados era un año, por lo que fueron confirmados por la Corte Suprema de Justicia el 15 de enero de 1998, a través del Acuerdo 1-98. Asimismo, el Ministerio Público cuenta con una Instrucción General para el abordaje de delitos de discriminación, orientando al personal para mejorar la atención, investigación y solución de casos de discriminación.

[5] Por ejemplo el caso del líder del CCDA, Marcelo Sabuc, a quien le acusaron de instigar en la comunidad Nueva Libertad para que la gente no saliera de ella, en tanto que el señor Sabuc nunca ha estado en dicha comunidad.

[6] Suscrito el 19 de septiembre de 1996 entre el gobierno de Guatemala y la Unidad Revolucionaria Nacional Guatemalteca –URNG-.

III. Conclusiones

25. Es preocupante es el nulo avance en la agenda legislativa de las normas relacionadas a pueblos indígenas, pues en lo que va de esta administración en el Congreso de la República no se ha considerado el avance de temas relevantes como el derecho indígena y sus autoridades, los lugares sagrados, el desarrollo rural y rural, el uso de frecuencias por parte de las radios comunitarias y el reconocimiento de los trajes tradicionales.

26. El mayor número de violaciones o presuntas violaciones a derechos humanos de los pueblos indígenas se da por el derecho a la tierra y el territorio, en principio han sido sujetos a desplazamientos internos y en la actualidad nuevamente despojados de sus tierras, dejándolos en la pobreza y la miseria y violaciones al derecho a la alimentación, salud, vivienda, educación, acceso a la justicia y desarrollo entre otros; la defensa de este derecho a la tierra por parte de los líderes comunitarios y autoridades indígenas los ha visibilizado para que sean objeto de criminalización por parte del propio Estado y por la presión de grupos económicos poderosos que realizan esfuerzos constantes por despojar de la tierra a los pueblos indígenas.

27. Tan solo en el primer semestre del año 2018, se han registrado 19 asesinatos contra líderes comunitarios y el Estado no ha dado respuesta a este grave fenómeno. Es necesario que se realicen avances concretos en cuanto a la investigación, persecución, juzgamiento y condena de los responsables de tan deleznables actos.